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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK R. DANIELS,

Defendant and Appellant.

B205891

(Los Angeles County
Super. Ct. No. SA057290)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed.

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

After a first jury deadlocked on the guilt of defendant and appellant Derrick R. Daniels for assault with a firearm and attempted murder, a second jury found him guilty of those crimes. Although there was no gang allegation, the trial court admitted evidence that defendant has gang tattoos and is a self-admitted gang member. On appeal, defendant contends that the court abused its discretion by admitting the evidence. He also contends that his trial counsel rendered ineffective assistance by failing to request that the jury be instructed on voluntary intoxication. We disagree with these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

Kenneth Clark and defendant met in the early 1990's. In June 2005, Clark drove a modified gold or tan BMW 745LI. He sold the BMW to defendant for \$74,595.

Defendant's friend and business partner, John Veselovsky, financed the purchase.¹

According to Veselovsky, the purchase price was \$65,000, and Clark was supposed to give the remaining \$10,000 to defendant and Veselovsky. A week after Clark sold the BMW to defendant, Clark bought a silver Mercedes truck. Veselovsky helped Clark to finance this purchase as well.

Around 8:00 p.m. on July 28, 2005, defendant and Clark met. Defendant wanted to know the status of the \$10,000 check. Clark told defendant he didn't have the money. Defendant didn't say too much about it except, " 'I am not a fool.' "

Defendant left, but he soon called Clark and asked for another meeting, this time with Veselovsky present. They agreed to meet at a movie theater on Wilshire, near Selby. Around 10:30 p.m., Clark arrived at the movie theatre. Defendant was outside the theatre. He wore blue jeans and a white T-shirt. Defendant got into Clark's car, and he

¹ Defendant and Veselovsky were starting Big Boys Toys, a business customizing motorcycles.

told Clark that his girlfriend had dropped him off. Smelling alcohol on defendant, Clark asked defendant if he had been drinking. Defendant said he had not been drinking.

Clark asked defendant where was Veselovsky, but defendant did not answer. Clark knew something was wrong. Defendant was mumbling, he didn't look "right," and he smelled of alcohol. Defendant said he was there to take care of Veselovsky's business, because " "This is East Coast Crips, cuz. I am not taking any losses. You don't know who you're fuckin' with' " "² Clark felt uncomfortable and afraid. He tried to call Veselovsky, while defendant continued to mumble about not taking losses and "[t]his is East Coast gang." Defendant received a cell phone call while he was in Clark's car.

Clark pulled over to let defendant out of the car. Defendant got out of the car, pulled a gun from his waist area, and started shooting into the car at Clark. Clark's wrist was hit, but he was able to drive away.³ Defendant continued to shoot at Clark as he drove off. Fearing for his life, Clark thought, " 'Here we go.' Another gang-related situation."⁴

Clark called 911. When the police arrived, Clark did not identify defendant as his assailant because he feared for his life, as defendant had "stated gang language and I didn't want to go there, knowing that . . . in retaliation this is what normally happens when you say something in regards to someone trying to shoot you." Later, at the hospital, Clark identified defendant as his assailant. The day after he was shot, Clark identified defendant from a photographic six-pack.

Octavio Villalba worked near Wilshire and Selby. Around 11:00 p.m. on July 28, 2005, he had just gotten off work. While walking to his car, he heard gunshots. He saw a big, gray, four-door BMW. A Black man wearing jeans and a white shirt was in the

² Defense counsel's objection under Evidence Code section 352 to this testimony was overruled.

³ Clark no longer has the mobility in his wrist he once had.

⁴ A motion to strike the testimony under Evidence Code section 352 was overruled.

passenger seat, but he exchanged seats with the driver, a woman. After exchanging seats, they quickly drove away.

Keith Lewandowski was also in the area of Wilshire and Selby that evening around 11:00 p.m. He saw a light colored Mercedes sport utility vehicle (SUV) stopped at an intersection. A Black man wearing a white shirt and jeans or dark pants got out of the passenger side. He pulled a gun out of his pants and started shooting into the car. Lewandowski said defendant fit the description of and “resembles” the man he saw get out of the SUV. Lewandowski could not say with certainty, however, that defendant was the person he saw get out of the car that night.

Around the time of the shooting, from an area close to where the shooting occurred, calls were made from a cell phone defendant used. The day after the shooting, defendant asked Veselovsky, in whose name the cell phone was registered, to change the cell phone’s number. Defendant’s fingerprint was on the outside passenger side of Clark’s Mercedes SUV.

II. Procedural background.

Defendant was charged with count 1, assault with a firearm (Pen. Code, § 245, subd. (a)(2))⁵ and with count 2, attempted murder (§§ 187, subd. (a), 664). A jury deadlocked and the trial court declared a mistrial on July 12, 2007. But, on December 19, 2007, a second jury found defendant guilty of both counts. The jury found true great bodily injury (§ 12022.7, subd. (a)) and gun use (§ 12022.5, subd. (a)) allegations as to count 1. The jury found true great bodily injury (§ 12022.7, subd. (a)) and gun use (§ 12022.53, subds. (b), (c), (d)) allegations as to count 2.

The trial court sentenced defendant on February 5, 2008. On count 2, the court sentenced defendant to 27 years to life plus 25 years under section 12022.53, subdivision (d), plus two 5-year terms for two prior strikes under section 667, subdivision (a). The sentence on count 1 was stayed under section 654. This timely appeal followed.

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All further undesignated statutory references are to the Penal Code.

DISCUSSION

I. The trial court did not abuse its discretion by admitting gang evidence.

A. *Additional facts.*

Defendant was not charged with a gang enhancement. But some gang evidence was admitted. Clark testified that defendant, before shooting Clark, said, “ ‘This is East Coast Crips, cuz.’ ” Clark also testified that after the shooting he thought, “ ‘here we go’ ” again, “another gang-related situation.” Clark explained that he did not initially tell the police that defendant was the shooter because he was afraid of retaliation.

The trial court overruled defense counsel’s Evidence Code section 352 objection to Clark’s statements. The prosecutor then asked to introduce evidence that defendant has gang tattoos. He argued that the tattoos went to Clark’s credibility and to identification. The court initially agreed with defense counsel that the tattoos were irrelevant: “The only reason the tattoos would be relevant is if he saw them, otherwise they are not relevant.”⁶

Later, the prosecutor asked to call a detective to testify about defendant’s tattoos. This discussion ensued:

“The court: Well, there is no . . . evidence that Mr. Clark ever saw them. If Mr. Clark had testified to seeing them.

“[The prosecutor]: . . . [I]t goes to his credibility. He says, ‘This is East Coast. Don’t mess with me. I am not taking any losses,’ and the guy has the tattoos on his upper arms that says, ‘East Coast.’ Goes to his credibility as to how scared he was. It goes to his credibility.

“The court. No.

“[Defense counsel]: It doesn’t go to his credibility, because he didn’t know about the tattoos. I am not going to argue East Coast. We are not going to argue that to the

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At the first trial, the trial court excluded evidence of defendant’s gang tattoos, finding that because there was no evidence Clark knew defendant had tattoos, the tattoos were irrelevant to the sole issue on which the gang evidence had been admitted.

jury. It is clearly prejudicial. People are going way outside anything probative in order to get this in to prejudice this jury against the defendant. Last trial it did come in, it shouldn't have come in.

“[The prosecutor]: That's not the standard.

“The court: Well, first of all, I think that I was thinking in terms of the effect it had on his state of mind, but I do think it has relevance as to whether or not he made these statements in the first place.

“[Defense counsel]: He didn't. He didn't make the statements. He wasn't in the car. It is not an issue whether he made the statements.

“The court: Statements were made in the car.

“[Defense counsel]: He didn't make the statements. We are going to argue he is not in the car, so how is it relevant if he made the statements? But he is never in the car.

“The court: I understand that you are arguing he wasn't in the car. I think it goes to his credibility.

“[Defense counsel]: Well, it is not. Whether those statements are made or not initially, how does it go to the credibility? Allowing him to put more information in that my client – on this, nobody boosted the credibility on this issue. It is clearly more prejudicial. [¶] . . . [¶] . . . In the State of California, supposed to be admitted strictly in limited circumstances. Doesn't meet that. It is incredibly prejudicial.

“The court: But I am aware of a case right on point on this issue as to when the gang membership is brought in through the statements of the defendant itself during the course of the crime, that was a 211, where they stated that. It was allowed in. [¶] And here, I think it does go to his credibility. I do think that the probative value does outweigh the prejudicial value. I will give a limiting instruction.”

Later, the prosecutor raised the issue again and told the trial court he would ask the detective about defendant's tattoos. The court asked if “he” had seen the tattoos, and the prosecutor replied that “he observed them.” The prosecutor also represented that defendant admitted to the detective that he was a member of the East Coast Crips. Defense counsel renewed his objections and pointed out the absence of a gang allegation

and that the evidence didn't go to Clark's credibility. The court replied, "[I]t comes in, I think, for a couple of purposes[.] [O]ne, to corroborate the witness's statement relating to what [were] the statements made by the defendant prior to the shooting. And I think it is relevant as to that, his credibility. And, also, the fact that it provides an argument for the People. Argument, I assume, [to] explain why he was not cooperative with the police initially. So the issue of whether or not this statement was made is relevant and the context in which it was made is relevant to his conduct immediately following it. And I think his credibility is critical and central to the case."

Detective Anton Umansky thereafter testified that defendant has gang tattoos, an "E" and a "C," signifying an affiliation with the East Coast Crips. Defendant told the detective he belonged to that gang. The trial court then instructed the jury: "At this point I just want to admonish the jury that you may not consider evidence, this evidence of any kind of gang evidence at all. So it is only to evaluate the credibility or the believability of a witness, and for no other purpose. You may not consider this evidence for any other purpose. You may not presume from this evidence that the defendant is a person of bad character or that he has a disposition to commit a crime."

B. The gang evidence was relevant to Clark's credibility.

Defendant agrees that the trial court did not abuse its discretion by admitting evidence that defendant referred to "East Coast Crips" before shooting Clark, because it explained Clark's initial reluctance to identify defendant as the shooter. Defendant disagrees, however, that Clark's statement about this being "another gang-related situation" and Detective Umansky's testimony about defendant's gang tattoos and admission he belongs to a gang were similarly admissible. He thus argues that this latter evidence should have been excluded under Evidence Code section 352.

Evidence is relevant if it has a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) The test of relevance is whether it "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent or motive." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, disapproved on another ground by *People v. Yeoman*

(2003) 31 Cal.4th 93, 117.) “Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. [Citations.] . . . [¶] However, gang evidence is inadmissible if introduced only to ‘show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]’ [Citations.] In cases not involving a section 186.22 gang enhancement, it has been recognized that ‘evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]’ [Citations.] Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, ‘trial courts should carefully scrutinize such evidence before admitting it. [Citation.]’ [Citations.]” (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.) A trial court’s admission of evidence, including gang testimony, is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) The trial court’s ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.)

Although gang evidence should be excluded if there is no gang allegation and its probative value is minimal, matters, including gang evidence, having any tendency in reason to prove or disprove the truthfulness of a witness’s testimony may be considered by a jury. (Evid. Code, § 780; *People v. Harris* (1985) 175 Cal.App.3d 944, 957.) Matters that are relevant to a witness’s credibility include evidence that the witness is afraid to testify or is fearful of retaliation. (*People v. Sapp* (2003) 31 Cal.4th 240, 301; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587-1588.)

The first statement defendant challenges is Clark’s testimony he thought, “here we go again, another gang-related situation,” after defendant shot him. Although defendant can fathom no legitimate reason for the trial court’s refusal to strike this statement, the relevance of the statement is really no different than the relevance underlying defendant’s statement “East Coast Crips,” which defendant concedes was admissible. The latter statement explains why Clark initially failed to identify defendant as his assailant to the

police; he was afraid of retaliation. The challenged statement similarly shows that Clark thought the shooting was gang related, and, for this reason, he was afraid. It too was therefore admissible.

Defendant next argues that the other challenged gang evidence is irrelevant because he was neither charged with a gang enhancement nor did the evidence go to Clark's credibility. If Clark did not know of defendant's gang tattoos or of his gang membership before defendant shot him, evidence of those matters was, defendant contends, irrelevant. Defendant correctly points out that the presence of gang tattoos on defendant's body and his status as a gang member could not have contributed to Clark's fear, in the absence of his knowledge of them.

The admissibility of this evidence does not, however, hinge on whether Clark knew of the tattoos or of defendant's gang status. Defendant fails to recognize that the evidence buttresses Clark's credibility with respect to the issue of *whether defendant in fact made the reference* to East Coast Crips. Specifically, that defendant has East Coast Crips tattoos and is an admitted member of that gang tends to show that Clark did not lie about defendant's presence in the car and what he said. In other words, the evidence bolster's Clark's credibility by showing that defendant in fact did refer to the gang before shooting Clark. Nor was this evidence merely tangentially relevant. The defense was defendant was not the person in the car with Clark that night. Clark's credibility therefore was a critical issue for both the prosecution and the defense. Because the challenged gang evidence went directly to Clark's credibility, we cannot say it was either tangential or that the trial court abused its discretion by admitting it.

II. Trial counsel did not render ineffective assistance by failing to request an instruction on voluntary intoxication.

At defendant's first trial, the jury was instructed, over the prosecution's objection, on voluntary intoxication. At defendant's second trial, defense counsel⁷ did not request and the jury did not receive instruction on voluntary intoxication. Defendant now

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The same trial counsel represented defendant at both trials.

contends his trial counsel rendered ineffective assistance by failing to request that instruction. We disagree.

“A meritorious claim of constitutionally ineffective assistance must establish both: ‘(1) that counsel’s representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.’ ” (*People v. Holt* (1997) 15 Cal.4th 619, 703; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

“Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation’ [Citation.]” (*People v. Bolin, supra*, 18 Cal.4th at p. 333.) The “review of counsel’s performance is to be highly deferential. . . . ‘Because of the difficulties inherent in making the evaluation [of counsel’s tactical choices], a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . .’ [Citation.]” (*People v. Duncan* (1991) 53 Cal.3d 955, 966.)

Defendant here argues that there is no reason, other than ineffective assistance, why his defense counsel would have requested instruction on voluntary intoxication at his

first trial but not at his second.⁸ Although we agree there was evidence to support the instruction, we disagree his trial counsel was ineffective for failing to request it.⁹ As we have said above, a trial counsel is afforded significant leeway in making tactical decisions. Even a tactical error is generally not reversible. (*People v. Bolin, supra*, 18 Cal.4th at p. 333.) It is fairly clear from the record that it was trial counsel’s decision and strategy *not* to request an instruction on voluntary intoxication. As an initial matter, it is not clear that defense counsel requested the instruction at the first trial, as defendant asserts. At the first trial, there was an off-the-record conference, after which the court said it would instruct the jury on voluntary intoxication. The prosecutor argued there was insufficient evidence to support the instruction. The court disagreed, overruled the objection, and gave the instruction to the jury. From this, defendant infers his trial

⁸ Voluntary intoxication is not an affirmative defense to a specific intent crime. Rather, evidence of voluntary intoxication is admissible solely on the issue of whether defendant formed the required specific intent to commit, for example as here, attempted murder. (§ 22; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.) A trial court does not have a sua sponte duty to instruct the jury on voluntary intoxication. (*Saille*, at p. 1119.) The defense must request the instruction and is entitled to it where there is substantial evidence to support it.

Edited, CALCRIM No. 3426 provides: “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with specific intent. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] . . . [¶] In connection with the charge of attempted murder the People have the burden of proving beyond a reasonable doubt that the defendant acted with specific intent. If the People have not met this burden, you must find the defendant not guilty of attempted murder. [¶] . . . [¶] You may not consider evidence of voluntary intoxication for any other purpose.”

⁹ At the first trial, Clark said he immediately noticed that defendant smelled like alcohol. Defendant looked as if he’d been drinking, although he denied he had been. Defendant repeatedly mumbled and said things like “ ‘I am not taking any more losses’ ” and “gang affiliated type of verbiage.” Feeling that something was not right, and that defendant was intoxicated, Clark tried to end the conversation. Clark’s testimony at the second trial was substantially similar.

counsel requested the instruction. That is possible. But it is also possible that the trial court decided to give it, and defense counsel acquiesced to it. Indeed, during his closing argument at the first trial, defense counsel never mentioned intoxication. Rather, the focus of his argument was Clark's credibility. In other words, the defense was that defendant was not the person in Clark's car.

Clark's credibility remained the defense's focus at the second trial. Defense counsel cross-examined Clark pointedly, for example, about his real estate "consulting" business, inconsistencies in his testimony, his failure to identify defendant as his assailant immediately to the police, and about his relationship to defendant and Big Boys Toys. Defense counsel did not cross-examine Clark about his observations of defendant's demeanor when defendant got into the car. Moreover, defense counsel did not once mention defendant's possible intoxication on the night of the shooting during his closing. His argument instead focused on Clark's credibility, suggesting he was lying that defendant was the shooter.

The record therefore shows that defense counsel made a tactical decision to rely solely on a theory that Clark was lying about defendant's presence in the car on the night of the shooting. We cannot second guess that tactical decision by adopting defendant's suggestion that voluntary intoxication should have been offered to the jury as Plan B. Where an instruction on involuntary intoxication would have been inconsistent with the defendant's theory of the case, we cannot say that defense counsel had no rational tactical purpose in failing to request that instruction. (*People v. Wader* (1993) 5 Cal.4th 610, 643; see also *People v. Jones* (1991) 53 Cal.3d 1115, 1138-1139 [noting in the context of conflict of interest between a client and his counsel that the "presentation of conflicting defenses is often tactically unwise because it tends to weaken counsel's credibility with the jury"].) We therefore find that trial counsel did not render ineffective assistance of counsel by failing to ask for an instruction on voluntary intoxication.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.